IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23–ICA–148

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West Virginia Division of Corrections
and Rehabilitation, Defendant below,

Petitioner,

v.

Francis Iacovone, individually and
as Administrator of the Estate of
Rocco Iacovone, Plaintiff Below,

Respondent.

Appeal from a trial in Circuit
Court of Kanawha County
(Case No. 20–C–602)

PETITIONER WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION'S REPLY BRIEF

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I. ASSIGNMENT OF ERROR I: Petitioner preserved this argument for appeal and Dr. Charash's prior statements regarding the fault of Wexford were relevant and within the scope of the direct examination.

First, Petitioner has preserved all arguments raised here on appeal. Respondent argues that Petitioner failed to "argue the provisions of *W. Va. Code* § 55-7-13(d)(a)(2) at trial or in its Rule 59 motion" and that this argument is waived. (Resp't Br. at 14.) It appears Respondent is arguing that because Petitioner did not expressly cite this statute during the sidebar at trial or in its Rule 59 Motion that Petitioner has waived its argument that it was attempting to attribute fault to Wexford. This is not the correct standard for waiver and this argument fails.

The West Virginia Supreme Court of Appeals has "long held that theories raised for the first time on appeal are not considered." *Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 687 S.E.2d 123, 129 (2009) (quoting *Clint Hurt & Assocs. v. Rare Earth Energy, Inc.*, 198 W. Va. 320, 480 S.E.2d 529, 538 (1996)). The Supreme Court of Appeals is clear that it "will not consider nonjurisdictional questions that have not been considered by the trial court." *Zaleski*, 687 S.E.2d at 129. "The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal." *Id.* "[T]here is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom." *Id.*

Here, Petitioner successfully preserved all its arguments and is not required to cite every case and statute it relies upon in this appeal in order to cite them now. Petitioner clearly articulated to the circuit court at trial that Wexford would "be on the jury verdict form pursuant to statute. I have an absolute right to question about Wexford because under the statute Wexford will be on the jury verdict form." (App. 1216). Petitioner's counsel further stated that this related

to percentages of fault, and W. Va. Code § 55–7–13d(a)(2) is the source of that right. (*Id.*) Further, Petitioner's Rule 59 Motion clearly stated that the purpose of its examination of Dr. Charash was to discuss the fault of Wexford. (App. 493.) Petitioner clearly raised these same arguments at both the trial of this case and in its Rule 59 Motion and referenced its right to allocate fault. An argument is not waived simply because the statute which creates that right was not explicitly cited by counsel. Accordingly, this argument was preserved and was not waived.

Next, Respondent argues that Dr. Charash's prior allegations that Wexford was at fault were irrelevant and were outside the scope of the direct examination. These arguments also fail. At trial, Respondent's counsel Mr. diTrapano classified the purpose of Dr. Charash's testimony during his direct examination and stated "you've been retained in this case to give an opinion on causation, whether or not the liability and the misconduct on the part of the Department of Corrections caused the death of Rocco Iacovone." (App. 1208.) Then, Dr. Charash testified at trial "with reasonable medical certainty" that Mr. Iacovone would have been alive today if Petitioner's staff would have taken him to medical at 10:30 a.m. on Monday the day before his death. (App. 1208–1209.) Respondent argues that Dr. Charash was a "causation" witness and that this witness was not called to give an opinion on liability or on the standard of care as provided by Wexford. However, Respondent's counsel stated at trial, in his own words, that Dr. Charash was presented to give an opinion on "whether or not the liability and the misconduct on the part of the Department of Corrections caused the death of Rocco Iacovone." (App. 1208.) Petitioner's examination and/or impeachment of Dr. Charash regarding his opinions of the liability of Wexford and how Wexford's actions contributed to Mr. Iacovone's death were clearly relevant and within the scope of the direct examination.

Further, in his deposition, Dr. Charash never mentioned Petitioner and instead exclusively blamed Wexford. (*See generally* App. 1500–1508.) This deposition testimony was exactly what Petitioner sought to cross–examine Dr. Charash about at trial because this clearly contradicts Dr. Charash's statements that Mr. Iacovone would be alive today if Petitioner's staff had taken him to medical. (App. 1208–1209.) However, the circuit court prohibited Petitioner from examining this witness at all regarding Wexford and also from attacking the credibility of Dr. Charash regarding his prior inconsistent statements that Wexford, not Petitioner, was at fault for the death of Mr. Iacovone, which goes directly to causation and liability. That line of questioning was clearly "coextensive with, and limited by, the material evidence given on direct examination" because, as Respondent's counsel stated in their own words, Dr. Charash was a witness for causation and liability alone. Syl. Pt. 1, *State v. Barnett*, 226 W. Va. 422, 701 S.E.2d 460 (2010). Examining this witness regarding the extent Wexford contributed to Mr. Iacovone's death was well within the scope of direct because the testimony Dr. Charash gave during trial clearly contradicted his deposition testimony. The circuit court never reviewed this deposition transcript before making this ruling and instead found that this line of questioning related to the standard of care, which is simply incorrect and a complete mischaracterization. This was reversible error and Petitioner was clearly substantially prejudiced. As a result, this case must be remanded for a new trial.

II. ASSIGNMENT OF ERROR II: Petitioner has not waived its arguments regarding its examination of Francis Iacovone and the circuit court erred when it forbid Petitioner from calling this witness for his intended purpose.

First, Respondent argues that Petitioner has waived its ability to assert these arguments because Petitioner did not call Francis Iacoveone as a witness at trial. (Resp't Br. at 20.) However, Petitioner was prohibited by the circuit court from calling Francis Iacovone as a witness to discuss his prior allegations regarding the fault of Wexford. It is unclear how

Petitioner could have better preserved this argument for appeal because it was barred from questioning this witness regarding Wexford, which was the entire reason it sought to call this witness in the first place. Petitioner made clear at trial that he sought to call this witness for the purpose of discussing the fault of Wexford and Francis Iacovone's prior allegations regarding the same, and the circuit court clearly and unequivocally prohibited this. As a result, this argument was preserved, and Petitioner was not required to symbolically call this witness when the circuit court had already forbid it to engage in this line of questioning.

Next, Respondent argues that the circuit court was correct in its ruling because Petitioner sought to introduce evidence of a settlement. However, this is a complete mischaracterization of Petitioner's arguments and Petitioner was clear that it did not intend to introduce this evidence for this purpose. As stated at trial, Petitioner's sought to ask Francis Iacovone, the Respondent in this case, "about the fact that he originally brought suit against Wexford because he felt they were at fault, and that he and his lawyers hired people and all that because they were at fault and ask him if he still feels that Wexford was at fault in the death of his son." (App. 1231.) Petitioner raised this issue prior to calling Francis Iacovone as a witness due to the rulings related to Dr. Charash. Petitioner was clear that it did not want to introduce evidence regarding any type of settlement Wexford made with Plaintiff. (App. 1234.)

However, the circuit court again barred Petitioner from engaging in this line of questioning and ruled as follows:

> The jury doesn't know what resolved is. Maybe they think there wasn't enough evidence in that case and it was thrown out for some reason. I mean, it's so prejudicial.
> …
>
> I think it's entirely improper, I agree with that for that to go in front of a jury that they were a defendant and that that matter has been resolved. I just -- I think that it

> could confuse the jury. I think it's improper, and I'm not going to allow you to question him about Wexford.

(App. 1232, 1235.) The circuit court completely mischaracterized Petitioner's statements and found that he sought to introduce evidence of a settlement, despite counsel's clear statements to the contrary. Petitioner's counsel clearly stated that "I'm not going to say there was a settlement. What I want to point out is originally they filed this suit and alleged fault against Wexford. They felt that Wexford was at fault, not just us." (App. 1234.) However, the circuit court found that this was actually prejudicial to Respondent and completely forbid Petitioner was questioning Francis Iacovone regarding his decision allege fault against Wexford and his prior statements that they were responsible for Mr. Iacovone's death. Respondent's argument to the contrary is a compete mischaracterization and is unsupported by the record.

Finally, Respondent argues that Petitioner was not prejudice by this ruling because Wexford was included on the jury verdict form. (Resp't Br. at 23.) However, this prejudice cannot be cured by allowing Wexford on the verdict form when the circuit court prohibited Petitioner from introducing evidence regarding Wexford's fault. Petitioner clearly attempted to assert theories of comparative negligence against both Mr. Iacovone and Wexford. The ruling that Petitioner was not allowed to mention that Wexford was a prior defendant in this case or that Respondent previously blamed it for Mr. Iacovone's death was incredibly prejudicial to Petitioner. This blocked Petitioner's ability to present its defense and undoubtedly was reversible error. The circuit court prevented Petitioner from calling Francis Iacovone as a witness in this case and from presenting Petitioner's own defense of comparative fault which could have undoubtedly changed the verdict. As a result, Petitioner should be granted a new trial.

III. ASSIGNMENT OF ERROR III: Petitioner was not provided sufficient notice that Michael Hoosier or William Hardman would be called as witnesses which was trial by ambush.

It is undisputed that neither of these witnesses' names were disclosed to Petitioner until two weeks before trial. It is also clear from the facts of this case that Respondent's counsel had been in the possession of letters written by Michael Hoosier and William Hardman since the very beginning of this case but chose not to disclose their identity until two weeks before trial. (App. 1968–1972.) William Hardman's letter is dated May 16, 2019, and Michael Hoosier's letter is dated August 29, 2018. (*Id.*) Respondent admitted at the Pretrial Conference that Mr. Iacovone's mother identified these letters as being in her lawyer's possession a year and a half ago. (App. 859.)

In his Response, Respondent makes a variety of arguments where they claim Petitioner should been on notice that these witnesses would be called at trial without actually citing a single instance where Petitioner was provided with the name of these individuals. First, Respondent argues that Petitioner had sufficient knowledge of these key witnesses because those inmates were in the custody of the West Virginia Division of Corrections and Rehabilitation. This argument is contrary to the law and ignores the obvious advantages of Respondent, who was provided the names of these witnesses a year and a half prior to trial and refused to disclose them to other parties in this case.

Respondent then argues that these witnesses were appropriately noticed because a fact witness filed by another party, Wexford, noticed "[u]nknown inmates that interacted with the deceased prior to his death," (App. 40), and then Respondent's Fact Witness Disclosure noticed "[a]ny and all witnesses identified by the Defendant in this matter," (App. 45). This is clearly insufficient when it is clear that Respondent was aware of the name of the witnesses from the letters that had been in Respondent's counsel's possession for over a year and a half. (App. 859.)

Respondent also argues that Petitioner had notice of these individuals because they were Mr. Iacovone's cellmates, but this is completely false. (App. 994–995; App. 1532.) Neither Hoosier nor Hardman ever testified that they were a cellmate of Mr. Iacovone. Next, Respondent also attempts to argue that these individuals were identified during the deposition of Jeanette Iacovone, but this is also completely false. In Jeanette Iacovone's deposition, she stated that an individual named Bobby and two other people wrote her letters stating they were upset that Mr. Iacovone died. (App. 522.) Obviously, neither of these inmates were named "Bobby" and neither where identified by name in this deposition.

Further, the circuit court failed to apply any legal standard or discuss any of the *Prager v. Meckling* factors and allowed Respondent to use both of these witnesses without inquiring as to why they chose to never disclose them. Syl. Pt. 5, 172 W. Va. 785, 310 S.E.2d 852 (1983). As argued in Petitioner's Brief, these factors are clearly met here and Respondent has failed o refute these arguments. Respondent blatantly disregarded the Rules of Civil Procedure, and this evidence should have been excluded. A new trial must be granted for Petitioner.

IV. ASSIGNMENT OF ERROR IV: Petitioner's instruction regarding mitigation of damages should have been given to the jury.

The circuit court should have given Petitioner's mitigation of damages jury instruction to the jury and the failure to give this instruction was reversible error. Respondent argues that any prejudice by not giving this instruction was rectified by including Mr. Iacovone on the jury verdict form where the jury allocated no fault. (Resp't Br. at 29.) However, there was no instruction that covered this anywhere in the jury charge, and the jury was not instructed that Mr. Iacovone had a duty to seek medical care for himself or to make reasonable efforts to mitigate his own damages. Simply including Mr. Iacovone on the verdict form without instructing the jury that he had a duty to mitigate his damages does nothing to cure this error.

Further, the failure to give this instruction seriously impaired Petitioner's ability to assert its comparative negligence defense. This instruction conveys to the jury that, even if it finds that Petitioner was deliberately indifferent to Mr. Iacovone's medical needs, Mr. Iacovone had a duty to request medical care on his own and to mitigate his damages. This was integral to Petitioner's defense. It is undisputed that Mr. Iacovone was incarcerated in a prison which provided him with 24/7 access to medical care, if he requested it. Evidence was presented to show that he did not ask to go to medical and that he never attempted to get medical care for his illness. William Hardman testified at trial that Mr. Iacovone did not want to go to medical and did not want medical attention. (App. 1021–1022.) Respondent's own expert Dr. Charash stated that if Mr. Iacovone had received medical care even hours earlier that he might be alive. (App. 1208–1209, 1212–1213.) He went further and stated that Mr. Iacovone would be alive had he received care even a day earlier. Thus, the jury should have been instructed that Mr. Iacovone's decision not to seek medical care was a breach of his own duty. There was no guidance to the jury in the charge that Respondent had any duty to himself or that he had a duty to seek medical care for himself. This instructional error is sufficient enough to warrant a reversal of the verdict and to grant a new trial.

V. ASSIGNMENT OF ERROR V: The jury was not instructed that they needed to determine that Mr. Iacovone suffered a "serious medical need," which is part of the deliberate indifference standard.

The circuit court rejected Petitioner's deliberate indifference jury instruction and used Respondent's instructions only. However, the circuit court failed to instruct the jury that they must find by a preponderance of the evidence that Mr. Iacovone needed medical care for a serious medical need in order to find that Petitioner was deliberately indifferent. This is a well-established part of the deliberate indifference standard and is reversible error. In Response, Respondent argues that their proposed instruction No. 6 includes the "serious medical need'

language and that the evidence showed that Mr. Iacovone's conditions was serious. (Resp't Br. at 30–32.) Respondent also again argues that this argument was waived, this time because Petitioner did not emphasize the word "serious" in its objections. (*Id.* at 33.) All of these arguments fail.

First, Respondent argues Petitioner has now waived this argument. However, the record is clear that Petitioner told the circuit court explicitly that Respondent's instructions were "more general" and related to "subjective intent." (App. 1298.) This is exactly the same argument that is being asserted here because the objective portion of this test was not given to the jury, and Respondent's instructions only related to the subjective component. As stated in Petitioner's Brief, the Supreme Court set the standard for evaluating whether a prisoner's Eighth Amendment right to be free from cruel and unusual punishment was violated based upon a prison healthcare provider's deliberate indifference (subjective component) to the prisoner's serious medical needs (objective component). *Estelle v. Gamble*, 429 U.S. 97 (1976). Petitioner's argument here is that the objective portion of this test was not provided to the jury and counsel's arguments at trial show that he explained to the circuit court that Respondent's instructions related to subjective intent and did not use the correct standard of law. (App. 1295–1303.) This argument is not waived.

Next, Respondent's instruction No. 6 was not given to the jury and was withdrawn by Respondent. (App. 1301.) To the extent Respondent seeks to argue that this instruction successfully instructed the jury regarding a finding of a "serious medical need," this is incorrect because this instruction was never given. Next, Respondent argue that the evidence in the case showed that Mr. Iacovone suffered a serious medical condition, which according to Respondent means that the jury did not need to be instructed that they needed to make this finding. This is

not the standard and the law is clear that the fact finder must determine that Mr. Iacovone suffered a serious medical need. The jury obviously was not required to make this finding here and their verdict is in error.

As the West Virginia Supreme Court has held, "[a] trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law." *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 672, 558 S.E.2d 663, 671 (2001). This did not happen here. The law is clear that deliberate indifference is a two-part test, but the jury here failed to make this finding because it was not included in their instructions. These jury instructions do not accurately reflect the law and the charges failed to instruct the jury properly. As a result, their verdict is in error and the finding that Petitioner acted with deliberate indifference is invalid and was not made in accordance with established law. A new trial must be granted for Petitioner on this basis.

VI. ASSIGNMENT OF ERROR VI: The Judgment Order entered on December 16, 2022, must be amended and altered because it is contrary to established law in the State of West Virginia.

The Judgment Order entered on December 16, 2022, awarded Respondent prejudgment interest contrary to established law in the State of West Virginia; begins post-judgment interest from the date of the jury verdict which is contrary to the language of West Virginia Code § 56–6–31; and awards varying interest rates on the prejudgment interest from 2018 to 2022 which is also contrary to West Virginia Code § 56–6–31. (App. 468.) Respondent argues that Petitioner has misinterpreted the holdings in *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 311, 418 S.E.2d 738, 757 (1992) and *Jackson v. Brown*, 239 W. Va. 316, 801 S.E.2d 194 (2017). However, it is actually Respondent who misconstrues these holdings.

Respondent clearly states in his Response that

> [t]he lost wages award was not for wages that accrued between the date of Mr. Iacovone's death and the trial date, but rather was for wages he could have earned once he was either released from prison or granted parole. As noted by Petitioner, Dr. Clifford B. Hawley testified that the economic loss calculation began after Mr. Iacovone's anticipated release from prison, and not while he was incarcerated. (JA1078 – 1079)

(Resp't Br. at 36.) This statement alone shows that Respondent misunderstands the applicable law and is not entitled to prejudgment interest on these awards. The West Virginia Supreme Court's decision in *Jackson* clearly supports Petitioner's arguments. *See generally* 801 S.E.2d 194. In *Jackson*, the West Virginia Supreme Court of Appeals held it was proper under W. Va. Code § 56-6-31 to award prejudgment interest on a lost wages award because the award was "equivalent to one year of [the deceased's] salary, which would have accrued between June 2014 (when the accident occurred) and the trial date." *Id.* at 206. Again, this is exactly the same holding as *Pasquale*, where the West Virginia Supreme Court is clear that "future wage loss accruing after the jury verdict is not a prejudgment loss or 'special damage' under W. Va. Code, 56-6-31." *Pasquale.*, 418 S.E. at 757. Mr. Iacovone did not accrue any lost wages between the date of his death and the trial date and Respondent concedes this argument.

The award of prejudgment interest for the $400,000.00 for lost earning capacity and $275,000.00 for lost household services is contrary to clearly established law and Respondent's statements only support this argument. No special interrogatories to the jury would have resolved this issue because there was no evidence, and, according to Respondent, no claim for wages between the date of death and the trial date. At trial, Respondent introduced the testimony of Dr. Clifford B. Hawley, and he was clear that he started the economic loss calculation after Rocco Iacovone's anticipated release date from prison of October 23, 2025. (App. 1078–1079, 1092.) Dr. Hawley stated at trial that "I began those losses I say in October of 2025, about three years hence." (App. 1079.) His written expert reports reflect this opinion. (App. 511.) Further,

Table 1 of this report was submitted to the jury and the start date is clearly the year 2025. (App. 514.) Respondent presented no evidence of lost wages between the time of the death and the jury verdict and Respondent is now arguing that they were not even seeking wages between the date of Mr. Iacovone's death and the trial date. Granting interest on the entirety of the $400,000.00 award is exactly the error that was committed by the trial court in *Pasquale*.

Further, there is absolutely no evidence that Mr. Iacovone or anyone else was obligated to pay for any household services incurred by the time of trial. It is undisputed that he was incarcerated at the time of his death, and Respondent's own economic expert provides further support for Petitioner's argument. Dr. Hawley's Table 2 was provided to the jury and the table clearly begins the calculation for household services in the year 2025, which was when Mr. Iacovone was anticipated to be released from prison. (App. 515.) Dr. Hawley's testified the same at trial. (App. 1088–1089.) Accordingly, there is no evidence that Respondent incurred any household expenses prior to trial and the damage award clearly begins in the year 2025. Respondent is not entitled to prejudgment interest on the award for future household services, and the Judgment Order is contrary to established law and should be altered and amended.

Finally, the Judgment Order begins post-judgment interest on November 17, 2022, which was the date the verdict was returned from the jury, and awards varying interest rates on the prejudgment interest for the awards for funeral and burial expenses, lost earning capacity, and lost household services totaling $691,327.00. These awards are contrary to established law and Respondent has failed to present any arguments to the contrary. This Judgment Order should be amended on these grounds.

VII. ASSIGNMENT OF ERROR VII: The Amended Judgment Order entered on March 10, 2023, was entered in error and is also contrary to established law in the State of West Virginia.

Finally, the circuit court entered an Amended Judgment on Jury Verdict order that was also entered in error and is contrary to established law. (App. 728.) This Order contained a variety of errors, but Respondent only addressed the arguments relating to the post judgment interest rate. However, no matter how many times a judgment order is amended, the newly entered order does not adjust the post judgment interest rate to reflect the date of the newly entered order. As stated in Section VI above, West Virginia Code Section 56–6–31(b)(1) is clear that "that established rate shall remain constant from that date until the date of the judgement or decree." Thus, the post-judgment interest rate cannot be altered after a judgment order is entered by the circuit court. The language of the statute is clear that prejudgment interest begins when "the right to bring the action" occurs and accrues until "the date of the judgment or decree," which refers to the judgment order as entered by the circuit court. Thus, post-judgment interest in this case must begin on the date the Judgment Order was entered by the circuit court which was December 16, 2022 and that interest rate is 4.5%. However, it is obvious that Respondent sought this Amended Judgment Order in order to allow them to claim the 7.0% interest rate set for 2023, opposed to the 4.0% interest rate set for 2022, and their arguments are transparent and obviously contrary to established law.

Here, the Amended Judgment Order orders prejudgment interest totaling $140,188.54, which is erroneously calculated as described above, and then orders "Plaintiff shall recover from and is awarded a total judgment in the amount of $851,425.54 against the West Virginia Division of Corrections and Rehabilitation with post-judgment interest thereon at the current rate of 7.0% from the date of entry of this Amended Judgment Order until paid." The amended order clearly

adds the erroneously calculated prejudgment interest to the total verdict and then grants post--judgment interest on this amount. The prejudgment interest is just that, interest on a portion of the judgment, and is not a part of the judgment itself. The award of post-judgment interest is obviously contrary to law. Accordingly, this Amended Judgment Order should be vacated and amended on these grounds.

CONCLUSION

Petitioner respectfully moves this Court to reverse the circuit court's order denying Petitioner's Rule 59 Motion, vacate the Judgment Order entered on December 16, 2022, and the Amended Judgment Order entered on March 10, 2023, and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for Petitioner West Virginia Division of Corrections and Rehabilitation do hereby certify that on the 8th day of September 2023, I electronically filed the foregoing ***"Petitioner West Virginia Division of Corrections and Rehabilitation's Reply Brief"*** with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following participants:

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